



SECRETARY OF STATE
KEVIN SHELLEY
STATE OF CALIFORNIA

February 8, 2004

Robert J. Urosevich, President
Diebold Elections Systems, Inc.
1611 Wilmeth Road
McKinney, TX 75069

VIA FACSIMILE
(972) 542-6044

Dear Mr. Urosevich:

I write regarding your letter to me dated February 6, 2004. As you recall, that letter was occasioned by Secretary Shelley's concern that your TSx machines in four California counties have no federally qualified firmware or software on which to operate despite the fact that we are just three weeks away from the March 2 primary. Secretary Shelley requested that you provide your backup plan in the event that the federal authorities do not grant such qualification in the next few days.

It is apparent from your response that no such backup plan has been created, and that you continue to "fly by the seat of your pants." Your suggestions regarding paper ballots seem to indicate that it is the role of the counties or the state to implement a workable backup plan to redress your company's failure to obtain federal qualification. For example, you state that the schedule you provide for the paper ballot option poses "significant risks," and that you cannot "represent whether the affected counties could implement this option." In view of the fact that Diebold was solely responsible for obtaining federal qualification, and that

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you have repeatedly represented to all concerned that you would obtain that qualification in a timely fashion, we find your attempt to palm off responsibility at this late date astonishing.

We are equally troubled by your discussion of the TSx 4.4.5 firmware and GEMS 1.18.19 software. First, we are flabbergasted that your primary "backup plan" for having failed to obtain federal approval of firmware and software for your TSx system is to propose using firmware and software for that system that is even further away from federal approval. Moreover, your letter seems to imply that the main thing standing in the way of using this software and firmware is state approval. In particular, you assert that "while this system configuration has been reviewed by your Election Division staff and external consultants, it has yet to receive state certification."

Let's set the record straight. First, version 4.4.5 has not only failed to receive federal certification, it has not even passed federal functional testing. The current version being tested, 4.4.4.10, is in pre-release form, and we understand that federal testers have continued to identify problems needing to be repaired.

Second, with respect to state testing, you have not even submitted a formal application requesting that the new software and firmware be approved. You have given us no supporting documentation. Despite this, the Secretary authorized our elections staff to fly to Texas to review the equipment last week. They reported that numerous problems with 4.4.5 and 1.18.19 remain, that patches were being created on the spot, and that essential documentation was missing. And in light of the fact that most of the staff's time was wasted on unnecessarily testing new opti-scan software to fix an earlier version that you now admit has no problems, staff had only a limited amount of time to review the pre-release versions of your new firmware and software.

Third, even if the 4.4.5 firmware had been ready to test last week, and had been tested and passed those tests without the need for yet more modification, you are well aware that firmware changes must be approved by the California Voting

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Systems Panel. By law, the Panel may consider such changes only after giving 30 days public notice.

Moreover, as you are well aware but did not acknowledge in your letter, firmware version 4.4.5 operates only with new GEMS software version 1.18.19. That software conducts the critical function of tabulating all of the votes recorded by the individual TSx units. That software is only in the testing phase, has not received federal approval, and after federal approval would still require state certification. Installing new, unapproved tabulation software at this late date could actually enhance the risk of inaccuracies in tabulating votes cast in the March 2 primary. In addition, both the new firmware and software would then need to be installed on the voting machines, and the machines tested by the counties for logic and accuracy. For this reason, we are mystified by your continued suggestion that 4.4.5 is an option for the March primary. Plainly, it is not. Your failure to gain approval for this firmware and software, despite repeated assurances to our office and to the counties is very troubling.

Finally, your letter states that Wyle and Ciber "are in the process of reviewing the AccuVote-TSx 4.4.3.27C firmware and GEMS 1.18.18 software." To set the record straight, the reason this review is taking place on the eve of the election is that your company abandoned -- if not undermined -- efforts to obtain federal qualification of this software and firmware at almost precisely the time you assured the Voting Systems Panel that approval was imminent. Moreover, even as late as our conversation on February 5, you were asserting this approval would be forthcoming no later than February 6. I note that your letter omits this assurance -- for understandable reasons. Despite your assurances, no report has been issued to date. Even if a positive report is immediately forthcoming, you make no assurances as to whether a NASED number will even be requested, much less received in time for the March election.

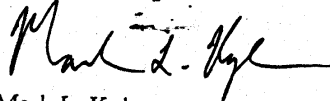
In view of the chaos your company has caused, we expected that your company would "step up to the plate" with an aggressive backup plan in case your machines fail to obtain federal qualification in time for the election. Your failure to do so

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raises grave questions about your company's suitability as an election equipment vendor.

Assuming it is your intention to continue waiting for federal qualification of 4.4.3.27C before moving to a paper backup plan, please provide our office with a detailed step-by-step plan for when and how you will move to your backup plan, and how you intend to mitigate the "significant risks" you suggest would accompany that plan.

Very Truly Yours,

A handwritten signature in dark ink, appearing to read "Mark L. Kyle", with a stylized flourish extending from the end.

Mark L. Kyle
Undersecretary of State